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Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
Amendment of §73.202(b) Table of Allotments, FM Broadcast Stations (Cloverdale, Montgomery and Warrior, Alabama)	)	MM Docket No. 94-78 RM-8472 RM-8525

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to §1.115(d) of the FCC Rules, North Jefferson Broadcasting Company, Inc. ("North Jefferson"), and Deep South Broadcasting Company ("Deep South") hereby submit this Opposition to the Application for Review filed March 21, 1997, by William P. Rogers ("Rogers"). Rogers has requested review by the full Commission of a decision of the Chief, Policy and Rules Division, Mass Media Bureau, in a Memorandum Opinion and Order ("MO&O") released February 21, 1997 (DA 97-332).

1. The MO&O denied Rogers' Petition for Reconsideration of a Report and Order of the Chief, Allocations Branch of the Division. DA 95-2413, 10 FCC Rcd 13630 (1995). The Report and Order in the rulemaking proceeding had denied a counterproposal by

Rogers to allocate FM Channel 254A to Florence, Alabama. The Report and Order instead granted a counterproposal in the same proceeding by North Jefferson and Deep South to modify the licenses of their FM stations in Warrior, Alabama, and Montgomery, Alabama, to specify operation of the stations on Channels 254C and 255C, respectively.

2. Deep South is the licensee of FM broadcast station WBAM-FM, Montgomery, Alabama. North Jefferson is an equal owner, with principals of Deep South, in the licensee of the Warrior station, which was formerly known as WLBI and is now known as WBHK. North Jefferson and Deep South, on whose behalf this Opposition is filed, will be referred to collectively as "WBHK/WBAM."

Summary of Argument

3. The Report and Order denying Rogers' proposal, and the Memorandum Opinion and Order denying reconsideration, both held the proposal to be technically defective. The decisions were based on three separate grounds, any one of which would be sufficient to warrant denial.

4. In his Application for Review, the only one of the factors in §1.115(b)(2) that Rogers cites for his claim of entitlement to Commission review is a contention that the actions of the Allocations Branch and the Policy and Rules Division are in conflict with case precedent. In fact, the actions are supported

and dictated by case precedent, which is cited in the orders themselves.

5. Any conclusions other than those reached by the Branch and Division, on any one of the three grounds for their decisions, would have been in conflict with settled law. The law is not only clear in the authorities cited but is supported by reasons that are clearly spelled out within the authorities and in the MO&O. Rogers argues for a result that would confuse and hamper the allocations process, create uncertainty where there is now clear guidance to those proposing new allocations, and cause delay whereas the Commission is now able to base its action on information available to it and the parties when the proposals are made.

Argument

A. Rogers' Proposal Was Short-Spaced to the Licensed Site of Another Station

6. Section 73.207 of the FCC Rules establishes certain minimum distance separations between stations. It says that the Commission will not accept petitions to amend the table of allotments "unless the reference points meet all of the minimum distance separation requirements of this section."

7. Section 73.208(a)(1)(i) provides that both the licensed site of a station and a construction permit site are reference points in determining distance separation. The Commission has

interpreted this section as requiring that "a rulemaking proponent must meet the separation requirements for both sites." Cut and Shoot, Texas, 11 FCC Rcd 16383, 16384 n.2 (Policy and Rules Division 1996.

8. Rogers' proposal was short-spaced to the licensed site of Station WZLQ(FM), Tupelo, Mississippi. Hence, it was deficient in compliance with the requirements of the Commission's technical rules.

9. Counterproposals in rulemaking proceedings "must be "technically correct and substantially complete when filed." Fort Bragg, California, 6 FCC Rcd 5817 n.2 (Policy and Rules Division 1991). There is simply no doubt that Rogers' counterproposal was not technically correct when filed, since it was short-spaced under §§73.207 and 73.208 to WZLQ's licensed site.

10. Though the proposal was adequately spaced to a different site specified in a construction permit that had been issued to WZLQ, it still had to meet the distance separation requirements to WZLQ's licensed site because no license application had ever been filed for the construction permit. Indeed, the period for construction specified in the permit expired with neither a license application nor an application for extension having been filed.

11. The Tupelo station filed an application for reinstatement of its expired construction permit more than thirty days

after its expiration, in violation of §73.3534(e) of the Commission's Rules. That request is still pending in the Audio Services Division. But even in the unlikely event that the construction permit should ultimately be reinstated,[1] it would not change the fact that Rogers' application was technically deficient when filed by being short spaced to a reference point to which it was required by §73.208(a)(1)(i) to meet the minimum distance separation in §73.207. That was precisely the stated reason for the Policy and Rules Division reaching in the MO&O the result it did. See DA 97-332 ¶6, second sentence.

12. The reason for that result is also spelled out in the MO&O:

> "[P]roposals and counterproposals are supposed to be capable of being effectuated at the time they are granted and cannot be contingent upon future actions by third parties. In this regard, since some authorized facilities are never built and licensed, we cannot assume that such facilities are in existence for the purpose of resolving related rulemaking matters." DA 97-332 ¶6, third sentence.

13. The MO&O cited and relied on a more detailed analysis in the Cut and Shoot case, supra ¶7, of the "unnecessary burdens on the administrative resources of both the Allocations Branch

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[1] Rogers' reliance on Baker v. FCC, 834 F.2d 181 (D.C. Cir 1987), for the proposition that reinstatement is not required, is misplaced. That decision, rendered in a case involving comparative applications for a new broadcast facility, held only that until an expired construction permit was declared forfeited it was "cognizable as an existing broadcast service for Section 307(b) attribution purposes" (emphasis added).

and the Audio Services Division" and the "unfair burden on parties who have filed comments in [the rulemaking] proceeding" that would result from the contrary policy that Rogers now urges. See Cut and Shoot at page 16384 ¶4.[2]

B. Rogers' Proposal Did Not Provide a 70 dBu Contour over the Principal Community

14. The second ground on which both the Branch and Division rejected Rogers' counterproposal is that it would not provide a city grade contour over the entire community of Florence, in violation of §73.315(a) of the Rules. A waiver of that rule would be necessary in order to grant the proposal. Rogers did not request a waiver. If he had, the waiver would have been denied. It is standard Commission practice to deny waivers of the city grade contour requirement at the allotment stage. See Greenwood, South Carolina, 3 FCC Rcd 4108 at 4109 ¶7 (FCC 1988), and page 3 ¶5 of the MO&O.

15. Instead, Rogers has relied on a case in which at the application stage 80% coverage of the principal community was considered "substantial compliance" with §73.315(a). Barry Skidelsky, 70 RR2d 722 at 734 ¶48 (Rev. Bd. 1992). The MO&O recognized the inapplicability of that case because it "involved a request for waiver ... at the application stage and the Commis-

[2] Rogers misses the mark in relying on two allocations decisions in which he claims the Commission departed from this policy. See Application page 3 ¶3. Neither involved competing counterproposals.

sion has required 100 percent city grade coverage at the allotment stage." See page 2 ¶2.

16. There is good reason for the distinction. As stated by the Commission in the Greenwood case, ¶14, at page 4109 ¶7, and relied on in ¶5 of the MO&O:

> "It is generally only at [the application] stage that the Commission has before it the information necessary to make informed judgments. The Commission generally cannot, in the course of rule making proceedings, evaluate the actual transmitter sites that will be specified in applications not yet filed. A party requesting waiver at the allotment stage may not turn out to be the successful applicant, and its site may, therefore, not be the one ultimately utilized."

17. Rogers cites, as exceptions to the policy of the Commission to require 100% city grade coverage at the allotment stage, the case of Bay Shore, New York, 57 RR2d 1275 (Policy and Rules Division 1985), and one other instance of departure from that policy cited in a footnote to Woodstock and Broadway, Virginia, 2 FCC Rcd 7064, 7065 n.2 (Policy and Rules Division 1987). Those decisions were adequately distinguished in ¶5 and n.8 on page 3 of the MO&O. Bay Shore involved a situation where there was only one possible site. The FCC has characterized it as a "factual situation ... such that the Commission could as readily determine the extent of any waiver required in the rule making context as it could subsequently in the application context." Greenwood, supra ¶15, at page 4109 ¶8. The other instance involved what the footnote in Woodstock described as unique circum-

stances, noting that the Commission had stated that it was waiving its city grade coverage requirement for "that proceeding only."

C. Rogers Improperly Used Terrain Enhancement To Demonstrate Principal Community Coverage

18. A separate but related ground for the action by the Division affirming the Branch action in the rule-making proceeding, and for denying Rogers' Application for Review, was his attempt to bolster his city grade coverage deficiency by using terrain enhancement based on his designated transmitter site.

19. The Commission's rationale for using average terrain figures in allotment proceedings instead of evaluating specific terrain data for a particular proposal is the same as for requiring 100% city grade coverage. It "generally cannot determine what specific transmitter sites will ultimately be applied for, nor whether the petitioner will be the successful applicant." Woodstock and Broadway, Virginia, 3 FCC Rcd 6398, 6399 ¶9 (FCC 1988).[3]

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[3] Though the Commission considered actual terrain data in that case, it made what it there called a "narrowly limited exception" to its policy where the petitioner was requesting an upgrade rather than a new allotment (so no competing applications could be filed). Id. at page 6399 ¶7. The petitioner had obtained assurance of availability of its designated site, had secured FAA approval, and would with terrain enhancement put city grade coverage over 100% of its principal community.

20. Even with terrain enhancement, however, Rogers' proposed coverage falls short of 100% coverage of his proposed community. Hence, aside from such policy considerations, there was no valid reason for waiving the city grade coverage rule in his instance.

Conclusion

21. In order to overturn the MO&O, Rogers would have to prevail on all three of the grounds for that decision. If the Commission upholds the application to him of the rule requiring minimum spacing to licensed facilities of other stations, he loses. If the Commission upholds the requirement that he put city grade coverage over 100% of his proposed community, he loses even if he somehow managed to avoid the minimum spacing requirement, because he does not claim coverage of more than 88%. And if the Commission does not allow him to use terrain enhancement in computing his city grade coverage, he does not even reach the 88% that he claims is "substantial" compliance with the rule.

22. This is simply not a case that is appropriate for Commission review in that it involves no departure from precedent and none of the other reasons listed in §1.115(b)(2) as warranting review.

23. In fact, the MO&O is consistent with settled precedent based on valid rationales clearly stated in the memorandum opinion itself and in the cases on which it relies. The policies

that have been developed in allocations proceedings, and on which the Division relied in the MO&O, are designed to assure compliance of proposals and counterproposals with the technical rules, avoid delay and unnecessary administrative burdens on the staff, and assure fairness to those making competing proposals.

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April 7, 1997

CERTIFICATE OF SERVICE

I hereby certify on this 7th day of April, 1997, copies of the foregoing Opposition to Application for Review have been sent by United States Mail, first class postage prepaid, addressed as follows:

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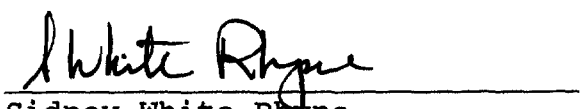

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